IN THE SUPREME COURT OF THE UNITED STATES

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No. A-_____

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VISA INC.; VISA U.S.A. INC.; VISA INTERNATIONAL SERVICE ASSOCIATION; PLUS SYSTEM, INC.; MASTERCARD INC.; MASTERCARD INTERNATIONAL INC.,
APPLICANTS

v.

NATIONAL ATM COUNCIL, INC.; ATMS OF THE SOUTH, INC.; BUSINESS RESOURCE GROUP, INC.; WASH WATER SOLUTIONS, INC.; ATM BANKCARD SERVICES, INC.; SELMAN TELECOMMUNICATIONS INVESTMENT GROUP, LLC; TURNKEY ATM SOLUTIONS, LLC; TRINITY HOLDINGS LTD, INC.; JUST ATMS USA, INC.; 901 FINANCIAL SERVICES LLC; ANDREW MACKMIN; BARBARA INGLIS; SAM OSBORN; PETER BURKE; KENT HARRISON; MARIN P. HEISKELL; BRYAN BYRNES

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APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable John G. Roberts, Jr., Circuit Justice:

Pursuant to Rules 13.5 and 30.2 of this Court, Visa Inc.; Visa U.S.A. Inc.; Visa International Service Association; Plus System, Inc.; Mastercard Inc.; and Mastercard International Inc., apply for a 30-day extension of time, to and including January 25, 2024, within which to file a petition for writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case. The D.C. Circuit entered its judgment on July 25, 2023, and a petition for rehearing was denied on September 27, 2023. App., infra, 1a-15a. Unless

extended, the time for filing a petition for a writ of certiorari will expire on December 26, 2023. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

1. This case presents the question of whether a class may be certified under Federal Rule of Civil Procedure 23(b)(3) as long as plaintiffs' proposed method of proving classwide injury can be deemed "colorable," "reasonable," and "well-established." This Court has long maintained that predominance under Rule 23(b)(3) is a "stringent requirement[]," American Express Co. v. Italian Colors Restaurant, 570 U.S. 228, 234 (2013), and a plaintiff's burden is "demanding," Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623-624 (1997), requiring a "close look" and "rigorous analysis" from the courts, Comcast Corp. v. Behrend, 569 U.S. 27, 34-35 (2013). Accordingly, the extent to which the predominance analysis overlaps with the merits simply "cannot be helped." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351, 363 (2011).

Because "Rule 23's requirements must be interpreted in keeping with Article III constraints," Amchem, 521 U.S. at 612-613, that "rigorous analysis" requires courts to find that plaintiffs' model "establish[es] that damages are susceptible of measurement across the entire class," Comcast, 569 U.S. at 35 (emphasis added). It would "reduce Rule 23(b)(3)'s predominance requirement to a nullity" to take the view that, "at the class-certification stage[,] any method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be." Id. at 36.

2. Applicants own and operate networks that allow consumers to withdraw cash from their bank accounts using automatic teller machines (ATMs). App., infra, 3a. Respondents are two groups of individual cardholders who paid surcharges for certain ATM transactions, and one group of several non-bank, independent ATM operators. Ibid. To withdraw cash from an ATM, a consumer may use an ATM terminal operated by an entity other than the bank that issued the consumer's payment card. Id. at 3a-4a. In those so-called "foreign" transactions, the ATM terminal communicates with the issuing bank of the consumer's payment card through an ATM network. Id. at 4a. The ATM network establishes operating rules and default fees that apply to the transaction. Id. at 3a-4a. Most ATM networks have rules prohibiting ATM operators from imposing surcharges on transactions routed over their networks that are higher than the surcharges applied to transactions routed over competing networks -- so called "non-discrimination" rules. Id. at 4a.

3. In 2011, respondents filed three separate class actions alleging that applicants' non-discrimination rules violate Section 1 of the Sherman Act. App., infra, 5a. According to the complaints, in the absence of applicants' network rules, bank and independent ATM operators would have lowered surcharges paid by consumers on transactions processed over ATM networks with higher fees. Ibid. All of the complaints sought treble damages -- which, according to plaintiffs, total approximately $9 billion -- and injunctions barring enforcement of the challenged rules. Id. at 7a.

The district court certified respondents' putative classes. National ATM Council, Inc. v. Visa Inc., Civ. No. 11-1803, 2021 WL 4099451 (D.D.C. Aug. 4, 2021). Writing that "plaintiffs, at this stage in the proceedings, need only demonstrate a colorable method by which they intend to prove class-wide impact," the court determined that plaintiffs had offered "colorable" and "reasonable" methods by which they "intend[ed] to prove" classwide injury and that no stricter standard was appropriate. Id. at *6. The court acknowledged applicants' argument that the methodologies plaintiffs offered to prove classwide injury were "hopelessly flawed" because of their failure to identify and winnow out substantial numbers of uninjured class members. Ibid. But the court did not address that critique or the evidence supporting it, concluding instead that that issue was "better suited for adjudication * * * on the merits." Ibid.

4. On appeal, applicants argued that respondents had failed to establish predominance because each class swept in, and could not exclude, substantial numbers of uninjured class members. Applicants argued that an application of the respondents' own regression model to real-world data in the record showed the existence of at least tens of thousands of uninjured class members. Applicants further argued that the very definition of the operator class swept in a significant number of class members for which plaintiffs' own expert lacked any evidence of injury.

The court of appeals affirmed. App., infra, 2a-15a. In confirming its decision to exercise interlocutory appellate jurisdiction, the court of appeals noted how "[the district court's]

statements of law were not entirely clear, its citations were not current, and its record analysis was notably terse." Id. at 6a. Indeed, the D.C. Circuit continued, "[t]he district court quoted older, nonbinding district court decisions, and failed to cite the Supreme Court's most recent case" on point. Ibid. And the legal standards that the district court stated "arguably are in tension with [this Court's] recent guidance." Id. at 7a. As the court of appeals put it, "[t]hat is surprising and unfortunate." Id. at 6a.

Despite those findings, the court of appeals nevertheless concluded that the district court had correctly certified the classes. The panel recognized that a failure to "state and apply the correct legal standard" would "requir[e] reversal and remand," but it deemed the district court's statement that plaintiffs' model must be "colorable" to be legally correct. App., infra, 7a. The court of appeals reasoned that, when "[r]ead in context," the district court "appears to have used 'colorable' to denote * * * evidence 'appearing to be true, valid, or right,'" and that level of scrutiny "complies with [this Court's] precedent." Id. at 8a-9a (quoting Black's Law Dictionary 333 (11th ed. 2019)). The court of appeals proceeded to determine that there was "no error in the district court's conclusion" that plaintiffs had "satisfied Rule 23(b)(3) by providing reasonable, wholesale methodologies, tethered to [p]laintiffs' respective theories of liability, showing that all class members suffered injury." Id. at 14a.

5. Counsel for applicants respectfully requests a 30-day extension of time, to and including January 25, 2024 (a Thursday), within which to file a petition for a writ of certiorari. This case presents complex questions regarding the predominance requirement under Rule 23, with significant ramifications for all class actions. Counsel of record is currently preparing numerous briefs with proximate due dates and is presenting oral argument in four other cases during this period. See, e.g., Anne Arundel County v. BP p.l.c., Nos. 22-2082 & 22-2101 (4th Cir.) (oral argument Dec. 5, 2023); District of Columbia v. Amazon.com, Inc., Civ. No. 22-657 (D.C.) (oral argument Dec. 7, 2023); Williams Alaska Petroleum, Inc. v. State of Alaska, No. 23-328 (reply in support of cert. petition due Dec. 13, 2023); National Football League v. Gruden, No. 85527 (Nev.) (oral argument Jan. 10, 2024); Stroble v. Oklahoma Tax Commission, No. 120,806 (Okla.) (oral argument Jan. 17, 2024). Additional time is therefore needed to prepare and print the petition in this case.

Respectfully submitted,

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